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No. 91-1710

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., GULF STATES TOYOTA, and TOYOTA SOUTH, INC.,

Petitioners,

v.

THE HONORABLE SHAROLYN WOOD, 127th Judicial District Court, Harris County, Texas, (M. JACK HENRY and JANET HENRY, Individually, and M. JACK HENRY, Guardian of the Person and Estate of KAREN HENRY, and RON MANNING, as Representative of the Estate of JUDY NELSON MANNING, Real Parties in Interest),

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

REPLY BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

CASES — Page

Allied Chem. Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 4
Avala of Texas, Inc. v. *West*, No. 91-830, *cert. denied*, 112 S. Ct. 937 (1992) 7
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 3
Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 5
Cummins v. *Paisan Constr. Co.*, 682 S.W.2d 235 (Tex. 1984) 6
Doctors Hosp. Facilities v. *Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988) 5
Hildwin v. *Florida*, 490 U.S. 638 (1989) 5
Ingersoll-Rand Co. v. *Harrington*, 805 S.W.2d 597 (Tex. Ct. App.), *writ denied* (1991) 7
Pacific Mut. Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991) 2
Walker v. *Packer*, 1992 WL 28419 (Tex. Feb. 19, 1992) 6
Wolff v. *McDonnell*, 418 U.S. 539 (1974) 2

OTHER AUTHORITIES

J. Nowak, R. Rotunda & J. Young, *Constitutional Law* (3d ed. 1986) 3

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REPLY BRIEF OF PETITIONERS

In their opposition to the petition for certiorari, respondents do not dispute that Texas trial judges, within the time period prescribed by State law, enjoy absolute and unreviewable power to set aside a jury's verdict and order a new trial. Nor do respondents contest that Texas stands apart from all other American jurisdictions in granting its trial judges such unfettered discretion to grant new trials for any reason, or for no reason at all. Respondents' failure to contest these two points—which

lie at the core of petitioners' due process attack on Texas' standardless system—is telling. Respondents have not attempted to mount a substantive defense of the Texas system because that system is manifestly indefensible.

Instead, respondents rely chiefly on an array of procedural objections to this Court's review. None of these objections has merit.

1. Time and again, this Court has made clear that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). Only last Term, this Court reiterated that "unlimited jury discretion—or unlimited judicial discretion for that matter— . . . may invite extreme results that jar one's constitutional sensibilities." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). To comport with due process, "discretion [must be] exercised within reasonable constraints." *Id.* at 1044.

Respondents cannot, and do not, deny that Texas trial courts have "unfettered discretion" to cast aside the product of a jury's deliberations and order a new trial. Pet. App. 1a. Respondents point out weakly that trial courts do not enjoy unfettered discretion to grant new trials *after* the statutory time period has passed and that Texas law does not allow a trial court to grant more than two new trials in the same case on grounds that the jury's verdict is against the weight of the evidence. See Opp. at 5 n.3. It is hardly reassuring, however, that a Texas litigant may be stripped arbitrarily of a favorable jury verdict only twice before state law will intervene. Within the statutory time limits, Texas trial judges operate free from any constraint: they may discard a jury verdict without holding a hearing, without considering any particular factors, without explaining their reasons, and without fear of review at any time on appeal. See Pet. 6-9.

As this case vividly illustrates, trial judges in Texas are free to exploit this power to extreme and outrageous ends, secure in the knowledge that their decisions—in the words respondents used in urging the trial court to act in this case—"can never be reviewed by any other court or questioned by the parties." Pet. App. 45a. Such a system is repugnant to the protection against arbitrary governmental action afforded by the Due Process Clause of the Fourteenth Amendment.

Respondents offer only two glancing suggestions as to why Texas' procedure for granting new trials should survive review under the Due Process Clause. First, respondents argue that unfettered discretion is constitutional because, as a general matter, there is no constitutional requirement of appellate review or of a statement of reasons in every instance where a trial court renders a discretionary ruling. See Opp. at 5, 8-10.[1] In this, however, respondents have misunderstood petitioners' constitutional attack. Petitioners do not claim that Texas is necessarily required to provide appellate review of new-trial orders or that trial judges necessarily must explain their reasons for granting such orders. So long as adequate safeguards exist to channel judicial discretion and check its abuse, no single procedural restraint

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[1] Respondents have even enlisted the long-buried "right-privilege" distinction in support of their cause. Arguing that the Constitution has nothing to say about Texas' refusal to permit review of arbitrary new-trial orders, respondents observe that "[i]n Texas, the opportunity to have a judgment or order of a trial court reviewed by an appellate court exists as 'a privilege only' and not as a matter of right." Opp. at 5 (quoting *Equitable Life Assurance Soc.* v. *Murdock*, 219 S.W.2d 159, 164 (Tex. Ct. App. 1949)). It has elsewhere been recognized, however, that "the right-privilege distinction has come to an end as both courts and commentators have realized that individuals should not be subjected to the unfettered discretion of government to withhold even 'privileges.'" J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 473 (3d ed. 1986) (footnote omitted); *see also Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972).

is compelled.[2] As *Haslip* made clear, however, *some* form of "reasonable constraint" must be provided, and the availability of appellate review and the existence of rules requiring a statement of reasons are among those safeguards that may save a system of discretionary decision-making from invalidation. Accordingly, the absence in Texas' system of any allowance for appellate review and of any requirement of a statement of reasons for granting new trials—as well as of any other "reasonable constraint" on the discretion exercised by trial judges—establishes its constitutional infirmity.

Second, respondents suggest that petitioners have not been deprived of any "property" entitled to procedural protection under the Constitution because Texas law does not recognize any property interest in a judgment until it is final. See Opp. at 6-7. Respondents simply ignore, however, the dispositive point that Judge Wood's arbitrary decision deprived petitioners of their significant financial investment in litigating the case before the first jury. This Court has repeatedly recognized that arbitrary litigation procedures deprive litigants of their right to property in violation of the Due Process Clause. See Pet. 11 (citing cases).

2. Given the indefensible nature of Texas' system of unfettered discretion, respondents chiefly rely, not surprisingly, on procedural objections. These objections are also without merit.

a. Respondents' primary argument is that petitioners failed to present the issues raised by the petition to the trial court. Opp. 3-4. It is dispositive, however, that the Texas courts themselves did not regard petitioners as

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[2] For example, although federal judges are not "required to enter supporting findings of facts and conclusions of law when granting a new-trial motion," federal law does guarantee litigants meaningful appellate review of such orders following judgment in the second trial. *See Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 & n.3 (1980) (per curiam).

having failed to raise the issue below: the Texas court of appeals denied mandamus solely on the ground that the trial court's discretion in such matters is "unfettered." See Pet. App. 1a. This holding recognized that the issue was properly raised. Where a state appellate court decides a petitioner's claims, and its decision "contains no clear or express indication" that its disposition is grounded in a failure to comply with state procedural rules, the Supreme Court has jurisdiction to hear even those claims raised for the first time in the state appellate courts. *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985) ("The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case"); see also *Hildwin* v. *Florida*, 490 U.S. 638, 639 & n.* (1989) (per curiam).

Moreover, it is clear that petitioners complied fully with all state procedural rules. It is true, for example, that a party seeking mandamus must first make a demand for action upon the trial court and permit the trial court to act upon that demand. See Opp. 3-4; see also *Doctors Hosp. Facilities* v. *Fifth Court of Appeals*, 750 S.W.2d 177, 178 (Tex. 1988). In this case, however, petitioners clearly and vigorously made a demand for action upon the trial court—namely, that the trial court deny the respondents' motion for a new trial. The trial court considered petitioners' arguments and rejected them, summarily vacating the jury's unanimous verdict and arbitrarily ordering a new trial. Petitioners thus fully satisfied Texas' rule requiring litigants to make a demand for action upon the trial court before seeking a writ of mandamus. See *id.* ("there can be no question" that litigant has satisfied demand requirement for mandamus where it has moved the trial court to act and the trial court has refused to do so).

b. Respondents next contend that petitioners have failed to satisfy Texas' requirements for mandamus in

that petitioners have not " 'establish[ed] that the trial court could reasonably have reached only one decision' " in ruling on the new-trial motion. See Opp. at 10 (quoting *Walker* v. *Packer*, 1992 WL 28419 (Tex. Feb. 19, 1992)). Respondents confuse the standard for granting mandamus with the availability of review on mandamus.

Walker simply establishes that, in Texas as elsewhere, mandamus will be granted only "to correct a 'clear abuse of discretion' committed by the trial court" and that "the reviewing court . . . cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable." *Walker*, 1992 WL 28419, at *4, *5. With this standard of review, petitioners have no dispute. Our point is that we should be given an opportunity to meet this standard, and that by denying litigants that opportunity with respect to new-trial motions, Texas law violates the Due Process Clause.[3]

c. Respondents also suggest that petitioners have failed to meet the Texas requirements for mandamus because petitioners have not shown that they are without an adequate remedy at law. See Opp. at 11-12. In particular, respondents assert that petitioners will have an ample opportunity to contest the trial court's order granting a new trial following final judgment in the second trial. This assurance is disingenuous at best, however, given respondents' own acknowledgment before the trial court that "Texas prohibits appellate challenges to a trial court's grant of [a] new trial, either by mandamus or on appeal from a judgment in the second trial." Pet. App. 42a; see also *Cummins* v. *Paisan Constr. Co.*, 682 S.W.2d

[3] Respondents' interpretation of *Walker* as imposing a two-pronged test for mandamus creates an obvious Catch-22. In respondents' view, petitioners have not satisfied a prerequisite of mandamus review because they have not demonstrated that the trial court committed "a clear abuse of discretion" in granting a new trial; yet, petitioners are permitted no opportunity to demonstrate that the trial court abused its discretion because mandamus is unavailable for review of new-trial orders.

235, 236 (Tex. 1984) (new-trial order may not be appealed following final judgment); *Ingersoll-Rand Co.* v. *Harrington*, 805 S.W.2d 597, 600 (Tex. Ct. App.) (same), *writ denied* (1991). In light of this rule, it is quite beside the point that " 'a remedy by appeal is [not] inadequate merely because it might involve more delay or cost than mandamus,' " Opp. at 12 (quoting *Walker*, 1992 WL 28419, at *7); the fact remains that *no* "remedy by appeal" is available for petitioners, no matter how long or how patiently they wait. Under these circumstances, it is completely disingenuous to suggest that petitioners have "an adequate remedy at law."

Respondents' attempt to raise a smokescreen of procedural issues should not obscure the merits of petitioners' challenge and the glaring constitutional defects in Texas' free-wheeling system for granting new trials. Petitioners have satisfied each of Texas' requirements for mandamus relief save the one they attack as unconstitutional: the rule that mandamus review is categorically unavailable to one contesting the granting of a new trial within the period of the trial court's "plenary" power.

3. Finally, respondents point out that the issues presented by this petition have already been presented for review earlier this Term and that the Court denied certiorari in that case. See *Avala of Texas, Inc.* v. *West*, No. 91-830, *cert. denied*, 112 S. Ct. 937 (1992). Far from proving the lack of merit in this petition, however, the existence of the *Avala* petition serves only to demonstrate that the constitutional violations engendered by Texas' system are recurring. That this is the second such case presented for the Court's review just this Term underscores that the arbitrary action taken here is not peculiar to a particular judge or merely an isolated case. Rather, the result in this case is endemic in the system Texas has established for itself, and will be replicated in successive cases unless this Court intervenes.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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